

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 PHILLIP MOCEK,

4 Plaintiff,

5 vs.

NO: CIV-11-1009 JB/KBM

6 CITY OF ALBUQUERQUE, ALBUQUERQUE
7 AVIATION POLICE DEPARTMENT,
MARSHALL KATZ, in his official
8 capacity as Chief of Police of the
Albuquerque Aviation Police
9 Department, JONATHAN BREEDON,
GERALD ROMERO, ANTHONY SCHREINER,
10 ROBERT F. DILLEY a/k/a BOBBY
DILLEY, LANDRA WIGGINS, JULIO DE LA
11 PENA, and DOES 1-25, inclusive,

12 Defendants.

13 Transcript of Motion Hearing before The Honorable
14 James O. Browning, United States District Judge, held in
15 Albuquerque, Bernalillo County, New Mexico, commencing on
16 Tuesday, November 20, 2012, at 9:07 a.m. and concluding at
17 10:48 a.m. Proceedings recorded by mechanical stenography;
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11 Also Present: Mr. Phillip Mocek
12 Ms. Mary Liddy, TSA
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1 THE COURT: Good morning, everyone. I appreciate
2 everyone making themselves available to me this morning.

3 All right. The court will call Phillip Mocek versus
4 City of Albuquerque, et al., Case Number 1:11CIV1009 JB. This
5 case has been reassigned, so it's JB/KBM.

6 If counsel will enter their appearances. Let's start
7 with the plaintiff.

8 MS. BOELCKE: Mary Lou Boelcke for the plaintiff.

9 THE COURT: Ms. Boelcke, good morning to you.

10 MS. BOELCKE: Good morning.

11 THE COURT: And is your client on the phone?

12 MS. BOELCKE: Yes, he is on the phone.

13 THE COURT: Mr. Mocek, are you there?

14 MR. MOCEK: Yes, Your Honor, I am.

15 THE COURT: All right, Mr. Mocek, good morning to
16 you.

17 And do you have a co-counsel that's on the phone?

18 Mr. Wheaton? Mr. Wheaton?

19 All right. All right. And for the defendants.
20 Let's start with the City of Albuquerque defendants.

21 MR. BAKER: Your Honor, Jeff Baker on behalf of the
22 City of Albuquerque, the Albuquerque Aviation Police
23 Department, Marshall Katz, Robert Dilley, Landra Wiggins, and
24 Julio De La Pena.

25 THE COURT: All right. Mr. Baker, good morning to

1 you.

2 And for the federal defendants.

3 MR. MARTIN: Good morning, Your Honor. Edward Martin
4 on behalf of the individual federal defendants.

5 And with me is Mary Liddy from the TSA.

6 THE COURT: All right. Mr. Martin, Ms. Liddy, good
7 morning to you.

8 All right. We're here on the federal defendants'
9 motion to dismiss. Ms. Wild and I were asking each other --
10 Marshall Katz, it seems like we've had him in some cases
11 before, but --

12 It's not coming up?

13 All right. His name seemed somewhat familiar, not
14 from anything I know outside of the courtroom, but I thought I
15 had had some cases with a Katz as a police officer, not with
16 the Aviation Department, but some other cases, but it's not
17 showing up, so --

18 MR. BAKER: Your Honor, Chief Katz's son is with the
19 Bernalillo County Sheriff's Department.

20 THE COURT: Okay. I thought it was Bernalillo
21 County. That's what I was associating with.

22 All right. On the motion to dismiss, what I would
23 suggest we do -- we can do this however the federal defendants
24 would like, it's their motion, but what I would suggest is we
25 break this down a little bit and take it a bit in bites because

1 of the three causes of action that are here.

2 What I was going to suggest, Mr. Martin, if you're
3 taking the lead on it, is maybe you do an overview, whatever
4 you want to say preliminarily, and then I'll give Ms. Boelcke
5 the same opportunity, and then we'll come back and deal with --
6 I think everybody started with the First Amendment violation --
7 or alleged violation first, if that's all right with you.

8 MR. MARTIN: Yes, Your Honor. Actually, we were
9 hoping to get right into the First Amendment issue.

10 THE COURT: All right. Do you have anything else you
11 want to say, or do you want to just go to First Amendment?

12 MR. MARTIN: The only thing we want to say, we think
13 this is a classic case in which qualified immunity is
14 appropriate because the plaintiff has not alleged a clearly
15 established constitutional violation. Basically, as we've
16 indicated in our briefs, there is no case law concerning
17 recording at TSA checkpoints, and, of course, with that being
18 the case, there's no case law concerning recording alternative
19 screening processes at TSA checkpoints.

20 THE COURT: Well, let's take the -- Let's take the
21 alleged violation first, because I always -- under Saucier and
22 Pearson I find it's somewhat difficult to figure out if there's
23 clearly established law unless I can first figure out what the
24 alleged constitutional violation is. Is that -- It seemed to
25 make sense, but the Supreme Court has now said it doesn't

1 matter which we take first, but in many cases there's a dispute
2 as to what the alleged violation is and you've got to kind of
3 figure that out before you can go match it with the case law.

4 Talk to me a second about something that has troubled
5 me a little bit about -- The TSA's position is that they don't
6 seem to have a regulation on this. I would think that if they
7 had a problem with recording they would have a regulation on
8 it, and my sense is that probably they don't care if news crews
9 come out, but they care if Mr. Mocek comes out, and that
10 concerns me, that there may be some unevenness in the -- in how
11 they deal with recording.

12 Your thoughts on that.

13 MR. MARTIN: Your Honor, they do have a policy. They
14 have a policy that you're allowed to record or photograph at a
15 TSA checkpoint in general, but then, of course, they have to be
16 allowed some discretion, and one of the issues was, you know,
17 you can't record the basic screens. There are certain things
18 that are sensitive, sensitive information.

19 And what the problem you had here is, it wasn't just
20 recording at the TSA checkpoint, it was recording an
21 alternative screening process. And, of course, you have to
22 then go back to the full circumstances of this case, which is,
23 one, you had an individual who showed up and refused to provide
24 his identification at the TSA checkpoint, so that kind of
25 ratchets up the security consciousness at that point; and he's

1 then sent to an alternative screening process. That
2 alternative screening process is designed to try to determine
3 who exactly he is and whether he should be allowed to fly or
4 not, whether it's safe to allow him to fly.

5 Now, of course, when he goes to the alternative
6 screening process he then pulls out his video recorder and
7 decides to begin recording that process. And, again, that's
8 where the security issue comes in. We've now ratcheted up to
9 the point where first he's a concern, now he's doing a second
10 activity that's a concern, and that's when the TSO's called the
11 local law enforcement, because the TSO's are not law
12 enforcement.

13 Now, why I say all that, why I say there is a policy,
14 and -- you know, a general policy, and that what the TSO's did
15 was reasonable in this case, of course, the Supreme Court has
16 indicated in Davis v. Scherer that whether they had a policy or
17 not does not prevent there from being or failing to be a
18 clearly established constitutional violation. And we've
19 provided a Tenth Circuit case, as well, that says the same
20 thing.

21 So we would argue that it's not terribly relevant
22 whether they had a policy, whether they had a regulation or
23 not, that, in fact, what they did under these circumstances was
24 reasonable and, therefore, there was no First Amendment
25 violation, but their conduct was reasonable in the course of

1 this case.

2 THE COURT: But when I read the -- When I read the
3 Complaint -- which this is a motion to dismiss; nobody's trying
4 to convert it to a summary judgment -- don't I have to assume
5 that Mr. Mocek was not creating a disturbance? There's nothing
6 in his allegations that would suggest that he was creating a
7 disturbance. So this sort of heightened and increasing
8 confrontation is really not there in his recitation of the
9 events, right?

10 MR. MARTIN: I would respectfully disagree, Your
11 Honor. Basically, you only -- you don't have to take
12 conclusory statements from Mr. Mocek; you're allowed to look at
13 the facts as they were presented, and, of course, because he
14 summarized two statements from the TSO's, we have attached
15 those to our motion to dismiss as we're allowed to do.

16 Now, as we've indicated, disturbance didn't
17 necessarily mean raising your voice, which seems to be the
18 plaintiff's contention.

19 THE COURT: Let's talk about these things you've
20 attached. I guess certainly I've been in securities cases and
21 contract cases where somebody refers to an insurance policy or
22 to an S1 or K1 or something like that, but I'm not sure I've
23 been in a case, in a 1983 case for example, which is more
24 typical, where somebody's attached the police report and said,
25 Well, you've got to take our version of the events. So I've

1 not seen this before. Why do I get to consider the police
2 reports in this case?

3 MR. MARTIN: Again, Your Honor, we didn't attach a
4 police report because a police report would cover a whole bunch
5 of conclusions and things other than the individual statements.
6 What we did is attach two statements which plaintiff
7 summarized, because the plaintiff had copies of these, so the
8 plaintiff summarized it in his pleadings, and, therefore, to
9 provide the entire story the Supreme Court and as far as I know
10 the --

11 THE COURT: Does he refer to these reports in his --
12 in his Complaint?

13 MR. MARTIN: Yes, Your Honor. He refers to these
14 specific statements and summarizes them, and that's why you're
15 allowed to consider them.

16 THE COURT: All right. Well, if I hear the TSA, it's
17 not really defending -- this morning it's not really saying
18 much about the constitutional violation here, it's just wanting
19 to go clearly -- to the clearly established.

20 MR. MARTIN: Obviously, we think you can consider
21 both, Your Honor, but Pearson does, certainly, give you the
22 opportunity to jump straight to not clearly established. And
23 what that does, of course, is it let's you, you know, apply the
24 general rule of constitutional avoidance; it avoids us of
25 having the potential problem of you finding something

1 constitutionally -- a constitutional violation but then not
2 clearly established, of course. That would be great for the
3 individual federal defendants, but then the TSA is stuck with a
4 ruling concerning the constitutionality of this issue.

5 The bottom line is, there is not a lot of case law
6 about these checkpoints. I mean, they're all post-9-11
7 checkpoints. There is no case law concerning recording at
8 these checkpoints, no case law concerning recording alternative
9 proceedings at these checkpoints, and then even the fairly far
10 removed issue brought up by the plaintiffs of police --
11 recording of police activity in a public place, there's no
12 Supreme Court case on that issue, there's no Tenth Circuit case
13 law, and the circuits are split.

14 So this is a classic case, really a textbook case in
15 which the First Amendment allegation fails because the
16 plaintiffs have failed to demonstrate that there was a clearly
17 established violation.

18 And, of course, the Fourth Amendment, if you'd like
19 to do it separately, we can, but the Fourth Amendment is even
20 easier, because the plaintiffs have cited no cases in which
21 merely summoning law enforcement is, in fact, a clearly
22 established violation.

23 THE COURT: Well, let's focus on the constitutional
24 violation. I clearly want to hear about it. I don't know if
25 this is the Pearson situation where we shouldn't -- we should

1 just go to the clearly established, but --

2 MR. MARTIN: Yes, Your Honor. Would you like to
3 discuss First Amendment, then, first?

4 THE COURT: Yeah. I want to hear from Ms. Boelcke
5 before we go to the Fourth Amendment.

6 But on the First Amendment, I guess I still don't
7 understand the United States's position on this as to when -- I
8 mean, it seems very fuzzy, which is usually not a good place
9 for the government to be on First Amendment issues, is when
10 somebody can photograph and when they can't. I don't
11 understand the position.

12 MR. MARTIN: The United States --

13 THE COURT: Since it doesn't have a reg, I can't go
14 read a regulation. You're probably the one person that can
15 tell me what the government's position is.

16 MR. MARTIN: Yes, Your Honor. The government's
17 position is that because we are in a nonpublic forum, the
18 Supreme Court has indicated this is a nonpublic forum, that the
19 actions of the TSO's had to be reasonable to avoid there being
20 a First Amendment violation, and that's where we get back to
21 what actually happened here and why they did what they did.

22 So, first of all, the plaintiff comes in, refuses to
23 show his identification. That -- So, normally, if you go
24 through an airport, you deal with one person. Here, now,
25 because he refuses to show his identification, we now have to

1 send him to an alternative screening person. So now he's
2 dealing with a second TSO. That TSO has to call a centralized
3 office, who will provide the questions, who will provide the
4 information to decide whether Mr. Mocek can fly or not.

5 Likewise --

6 THE COURT: But if the whole point of him wanting to
7 film is he wants to film an encounter in which he doesn't have
8 an ID, why is it relevant that he -- that he doesn't have an
9 ID?

10 MR. MARTIN: Because, again --

11 THE COURT: It sounds to me like the whole purpose of
12 going to the airport without an ID and then beginning this
13 filming was to -- was to -- was, in fact, to film what happens
14 to somebody that doesn't have an ID.

15 MR. MARTIN: But how would the TSO's know that, Your
16 Honor? Of course, their job --

17 THE COURT: But isn't it really when it comes to the
18 First Amendment what the public knows about whether they can
19 film or not?

20 MR. MARTIN: Really what we're going to is what's
21 reasonable. That's the test in this case, what's reasonable
22 for the TSA's -- TSO's, excuse me. And they don't know why
23 he's there filming. He doesn't say. So could he be attempting
24 to film to decide on the vulnerabilities of the system, or
25 could he be setting a distraction so other people can go around

1 the system? They don't know that. That's why they have to
2 call the local law enforcement to investigate further.

3 THE COURT: But if we go to these cases about filming
4 police activity you don't know why they're filming it, either.
5 It doesn't seem that the circuits -- and I could be corrected
6 here -- but the ones that have said that you can film police
7 activity haven't been that interested in the purpose of it.

8 MR. MARTIN: They have certainly been interested in
9 where it occurred. Obviously, the one on the Boston Commons,
10 the First Circuit case, talks about --

11 THE COURT: But that's a different issue, about where
12 it occurs.

13 MR. MARTIN: Right.

14 THE COURT: But they don't seem to be interested in
15 why it's occurring.

16 MR. MARTIN: Again, because there you're in a public
17 forum, so now you're talking about strict scrutiny, a very
18 difficult standard. You've got the three different types of
19 forums, the difference between a public and a nonpublic forum.
20 So the nonpublic forum, an airport, takes it down to the
21 reasonableness standard, and that's the difference between --
22 one of the differences, obviously, between those cases.

23 THE COURT: Well, let's explore that a second,
24 because I'm not sure I've had a case in this area.

25 But if the -- If the government allows First

1 Amendment activity in a nonpublic forum, which you're saying
2 the airport is --

3 MR. MARTIN: Yes, Your Honor.

4 THE COURT: -- they make a decision to allow it,
5 you're still saying that once they -- once they allow it,
6 then -- then the reasonableness standard applies.

7 MR. MARTIN: That's correct, Your Honor.

8 THE COURT: So they can pick and choose on that day
9 who's going to engage in First Amendment activity and who's
10 not.

11 MR. MARTIN: There's always going to have to be
12 discretion at security checkpoints, Your Honor, for what
13 actions they're going to take. There cannot be written rules
14 for each and every --

15 THE COURT: Let's pull it out of the security
16 context, and let's just put it in the Hare Krishna context.
17 What -- They can just pick and choose? Once they allow the
18 activity, strict scrutiny goes out the door and we're just back
19 to reasonableness, and they just have to present a reason as to
20 why this group can engage in First Amendment activity and this
21 group can't?

22 MR. MARTIN: They obviously can't do it for viewpoint
23 purposes, and that's where you got into the Hare Krishna case.
24 The viewpoint versus context issue. And that was a case in
25 which, of course, they were attempting to provide religious

1 material in an airport, and the Supreme Court said, Listen,
2 they're not stopping the Hare Krishnas because of their
3 religious views, the viewpoint discrimination; they're going to
4 stop anybody from soliciting at an airport because that's
5 disruptive to people passing through a airport, and that was a
6 reasonable basis -- that was a reasonable reason for that. So
7 that's why the Supreme Court allowed that in the Hare Krishna
8 case. And I think that's applicable here, too.

9 Again, Mr. Mocek never said what his viewpoint was.
10 He does in his Complaint. He talks about the reason why he
11 wouldn't provide his ID, because he thinks that's a way for the
12 airlines to make money, and he doesn't believe -- he believes
13 it's then used for the various watch lists that the government
14 has, but he didn't tell that to the individual federal
15 defendants in this case. He just says, "I will not provide my
16 ID." They send him to an alternative checkpoint, and at that
17 point he decides to film, and when he's asked not to film, he
18 refuses. And at that point, again, it was reasonable for them
19 to call. And that's, of course, all they do. All they do is
20 they call the local police.

21 THE COURT: What is -- What is the alternative
22 security checkpoint? He makes the allegation that he can go
23 through here, and has many times, without an ID. Is that
24 possible?

25 MR. MARTIN: It is possible. My understanding of the

1 process, Your Honor, is what they do, is they call a
2 centralized office, and that centralized office uses the
3 various computer data basis available to them to allow TSO on
4 the ground to ask questions to the individual to confirm his or
5 her identity. Now, if they can't do that, if they can't
6 identify him or, obviously, if he's on some watch list, then,
7 in fact, he will not be allowed to fly at that point.

8 THE COURT: And that requires a certain amount of
9 cooperation, to fly without --

10 MR. MARTIN: That's exactly right, Your Honor. So
11 instead of -- In this case, instead of answering their
12 questions, although they never really got to the
13 answering-questions process, the plaintiff is going to film
14 instead. So he's going to stand there and film while the
15 gentleman's attempting to ask him questions.

16 THE COURT: Well, I guess that's my question. If
17 they never got to the alternative procedures, if somebody can
18 fly without an ID and they never got to that procedure, then --
19 then is -- I mean, is TSA calling the police because of the
20 filming?

21 MR. MARTIN: No, Your Honor. And perhaps I misspoke.
22 They did actually begin the procedure. They didn't begin the
23 questions. The agent in this case, Breedon, actually did call,
24 and he tells -- he tells you that in his statement. He did
25 call the centralized office. He did request a behavioral

1 specialist to come view the situation.

2 What didn't happen is the later phases of this
3 procedure, where they begin actually asking the questions,
4 because, of course, Mr. Mocek began filming at that point, and
5 once he began filming they asked him to put down the camera,
6 because they did not want him to film these alternative
7 screening processes.

8 THE COURT: Well, is that across the board? Is that
9 the TSA's position, that these alternative screening procedures
10 are not to be filmed?

11 MR. MARTIN: Again, they don't have any specific --
12 that I'm aware of, they don't have any specific procedures for
13 filming all these. They have a general guidance for that you
14 can film at these checkpoints; however, there are certain
15 things you can't film. For example, the screens that they
16 have.

17 THE COURT: Well, I don't know this well enough, but
18 I would think that if somebody's pulled out of the lines and is
19 now undergoing an alternative screening process you're away
20 from the cameras. Am I right or wrong on that?

21 MR. MARTIN: We were actually at the airport
22 yesterday again, Your Honor. You don't have this in the
23 pleadings, so I'm not sure if it helps you that much. But it
24 is not that far. I mean, basically, from the front line he was
25 only 10 or 15 feet, maybe 20 feet away from where he originally

1 started. So you're not taken to a separate room or anything
2 like that.

3 THE COURT: You could film from that location?

4 MR. MARTIN: You could film the entire checkpoint
5 from that location, yes, Your Honor.

6 THE COURT: I guess the thing that troubles me, that
7 didn't seem to be the reason, though, that they told him to
8 quit filming. They don't say, "Don't film these cameras here,"
9 or "these videos," or the protectors or whatever they're
10 concerned about. They don't say that.

11 MR. MARTIN: Right. And again, I guess we come back
12 to, Your Honor, if this troubles you, then certainly Pearson
13 allows you to go straight to the not-clearly-established prong,
14 because that is plain as indicated in Pearson.

15 THE COURT: I guess before -- This is what I kind of
16 said at the beginning. I don't know what the constitutional
17 violation is, unless we sort of massage a little bit. Even if
18 I decide that I need to jump, I think I have to be able to
19 figure out exactly what the -- what the violation is before I
20 can go, then, and start matching up the clearly established
21 law.

22 MR. MARTIN: And that is difficult from the
23 Complaint, Your Honor. The Complaint alleges that the
24 plaintiff was ordered to cease recording, which caused his
25 arrest and seizure of his belongings. But then when we get to

1 their opposition they claim that the constitutional violation
2 was -- his right to information gathering was violated. So
3 somewhat similar, but, obviously, the right to gather
4 information was not ever mentioned in the Complaint itself. We
5 don't see that until the opposition.

6 But the bottom line here is, what we're talking about
7 here is filming an alternative screening process at a security
8 checkpoint. I mean, that is what the First Amendment issue is
9 about in this case.

10 THE COURT: But is -- But I guess -- I mean, is
11 that -- Is that unlawful -- I mean, does TSA ban that sort of
12 filming of the alternative screening process?

13 MR. MARTIN: TSA does not -- as far as I'm aware,
14 does not have any regulations, but, again, I go back to
15 Davis v. Scherer. Regulations are not the issue here. It's
16 whether it's a constitutional issue or not or whether it's a
17 clearly established constitutional violation or not. And just
18 like probably in the Boston Commons there was probably no
19 regulations that said you can't videotape here. There was no
20 regulation, there's no specific regulation for this specific
21 instance.

22 But in the end it doesn't matter. It goes to whether
23 it's constitutional or not. And while the First and the
24 Eleventh Circuit have said it's a constitutional violation to
25 prevent recording in a public place of police activity, the

1 Third, Fourth and a number of district courts have said
2 differently, and when you have a split in circuits like that,
3 of course, that doesn't provide any information. And these
4 individual federal defendants are not lawyers, are not held to
5 trying to decide which side is, in fact, right. The Tenth
6 Circuit has not talked about it, nor does the Supreme Court,
7 and, therefore, it's -- this is just a textbook case of being
8 not clearly established.

9 THE COURT: All right. Anything else you want to say
10 on the First Amendment issue?

11 MR. MARTIN: No, Your Honor.

12 THE COURT: All right. Thank you, Mr. Martin.

13 Do you have anything on this issue, Mr. Baker?

14 MR. BAKER: No, sir.

15 THE COURT: All right. Ms. Boelcke, do you wish to
16 address the -- any preliminary remarks you want to make, and
17 then if you want to address the First Amendment issue first?

18 MS. BOELCKE: Yes. First, I would just like to say
19 that the defendants have inserted facts into their motion which
20 are not in the plaintiff's allegations in his Complaint.

21 THE COURT: Well, I read your -- I read your -- I
22 read your response, but Mr. Martin and I have kind of distilled
23 a little bit down to what may be the actual scene for the First
24 Amendment.

25 What is it that troubles you about that? What is it

1 that is inconsistent with the way we were sort of parsing it at
2 the very end as a way of the Court looking at what occurred
3 there?

4 MS. BOELCKE: I think if the Court looks at the case
5 Tobey versus Napolitano there's a First Amendment violation of
6 a person who was traveling who got not just to the security
7 checkpoint, who got to the -- all the way to the X-ray
8 machines, and the case is very similar on the First Amendment,
9 and the Court decided it could not dismiss the case because
10 if -- It was the same issue. There were TSA officers who
11 called in the airport police to make the arrest, and the Court
12 held that if, as the plaintiff alleged in the Complaint, those
13 officers called the local officers in because of the First
14 Amendment activity by the traveler, then that would be a First
15 Amendment violation, and the Court did not dismiss the
16 Complaint on the 12(b)(6) motion.

17 THE COURT: Well --

18 MS. BOELCKE: I'm not sure if that's what you're
19 asking me, but I'm not sure what you are asking me.

20 THE COURT: I guess for the First Amendment purposes
21 it seems to me that it's irrelevant whether we call in APD,
22 City of Albuquerque, FBI, whatever.

23 The question is whether they can stop somebody from
24 filming. Isn't that the -- That's the First Amendment issue,
25 right?

1 MS. BOELCKE: Yes, that's the First Amendment issue.
2 And because -- Because they don't have -- they had no reason to
3 ask him to stop. There's -- There is a policy that allows them
4 to -- people to photograph or film in that area. The
5 Albuquerque police videotape every encounter they have with the
6 public.

7 THE COURT: Theoretically.

8 MS. BOELCKE: Well, they're supposed to under an
9 order by the mayor and chief of police.

10 THE COURT: We see them from time to time.

11 MS. BOELCKE: Okay. And the fact that they stopped
12 him from filming right when he started is viewpoint
13 discrimination. I don't think there's any other way to look at
14 it. They had no other reason to stop him.

15 THE COURT: Well, I guess what Mr. Martin's saying is
16 that it's hard -- it's hard to have -- it's hard for the TSA to
17 do a viewpoint discrimination if they don't know why the guy is
18 filming. I guess that's what he's saying.

19 Is that fair, Mr. Martin?

20 MR. MARTIN: Yes, Your Honor.

21 THE COURT: Okay. So that's his response to the
22 viewpoint, that --

23 MS. BOELCKE: So if --

24 THE COURT: -- you've got to have a viewpoint while
25 you're filming before you can discriminate. And your thoughts

1 on that.

2 MS. BOELCKE: There is no evidence that they ever
3 asked him for a viewpoint as to why he was filming. I believe
4 they assumed what his viewpoint was, and based on their
5 assumptions they told him to stop.

6 If -- If that's true, that you can -- If you have the
7 right viewpoint you're allowed to tape, and if you've got the
8 wrong viewpoint you're not. That's viewpoint discrimination.

9 THE COURT: Well, let's say Channel 13 shows up out
10 there and wants to do this. It sounds like they're probably
11 going to allow it, you know, as long as they can position the
12 camera right and stuff like that. Then it looks to the -- to
13 someone that that is news gathering or information gathering or
14 something like that.

15 Isn't the position -- Isn't the -- Isn't the picture
16 that Mr. Mocek was giving that day somewhat ambiguous? I mean,
17 you don't know -- It seems a reasonable officer could say, "I
18 don't know why he's doing this."

19 MS. BOELCKE: I don't -- Because they don't know, I
20 don't think that gives them a right to stop it by not knowing.

21 THE COURT: Well, let's say it's just a -- you know,
22 I've got lots of people here with psychological reports, it's
23 just somebody that's not wired well that day and is just there
24 to kind of hassle, not particularly a viewpoint at any point,
25 they just -- you know, they don't know if he left his ID on

1 purpose or accidentally or what the deal is.

2 Your thoughts on that?

3 MS. BOELCKE: If the person is --

4 THE COURT: They can't explore that some more?

5 MS. BOELCKE: If the person is hassling, that's a
6 different scenario than we have. We don't have any hassling by
7 Mr. Mocek. We have a person --

8 THE COURT: That's fair enough.

9 MS. BOELCKE: -- filming.

10 THE COURT: No, I think I can assume that for
11 purposes -- But at least it could present itself even without a
12 confrontation, without a disturbance, as an ambiguous thing,
13 rather than viewpoint discrimination, I guess is my point.
14 Isn't that true? I mean, you kind of have to have some
15 knowledge of something before you can discriminate against it.

16 MS. BOELCKE: That's true.

17 THE COURT: I'm wondering if there's enough knowledge
18 here presented by the picture to discriminate against it on the
19 basis of viewpoint.

20 MS. BOELCKE: Well, not knowing the viewpoint could
21 be a viewpoint discrimination also. And if that was their
22 position, then that should have been the policy and position
23 that they informed Mr. Mocek of prior to him even going to the
24 airport.

25 Their general policy, as Mr. Martin said, is filming

1 is fine. Anybody can film. We're going to stop you if -- you
2 know, if we have -- We have discretion to stop you, though, if
3 we think it's necessary, you know.

4 There was no necessary cause here to stop him,
5 because he was acting in a totally peaceful way and not doing
6 anything -- anything to cause them to arrest him. If they had
7 not -- You can't jump from -- They jumped -- As soon as he
8 started filming, they arrested him. That was a violation of
9 his First Amendment right to gather news and information for
10 whatever reason he has. You know, he didn't show any purpose,
11 but he didn't show any bad purpose, he didn't show any what
12 they would possibly consider good purpose.

13 THE COURT: What was he going to do with this? Was
14 he going to put it on the Internet, or what's the purpose of
15 him filming this?

16 MS. BOELCKE: You know, I'm not really sure what his
17 purpose was in filming this. I don't want to speak for him at
18 this point, Your Honor.

19 THE COURT: Well, let's assume for a second that
20 there wasn't viewpoint discrimination. Let's assume that for a
21 second. Do you agree that the standard here is reasonableness,
22 we don't need to get into strict scrutiny because of the
23 nonpublic forum of the nature?

24 MS. BOELCKE: Yes.

25 THE COURT: So that's the standard?

1 MS. BOELCKE: Yes.

2 THE COURT: And why do you, then -- If there was no
3 viewpoint discrimination, why do you say that TSA acted
4 unreasonably?

5 MS. BOELCKE: Because Mr. Mocek had a right under the
6 Constitution to film public officials that are in a public
7 space. It might not be a traditional public forum as we think
8 about it under the First Amendment, but it is a public space
9 where the public is allowed. These were government officials
10 going about government business that affects the public. He
11 has a right to gather information in that space. So anything
12 that's going to interfere with that is unreasonable when
13 there's no -- no valid reason for it, when they cannot show
14 that there is a reason for it.

15 There's a case I'd like to refer to the Court -- we
16 didn't put this in the brief -- U.S. versus Wells, 789
17 F.Supp.2d, 1270, out of the Northern District of Oklahoma, and
18 it involved a sting operation by the FBI in a motel. They
19 were -- There was an undercover officer staying there. The FBI
20 wiretapped the entire room, and then later some other police
21 officers went in that room allegedly to conduct a search.
22 While they were there criminal activity happened in that room
23 and those police officer defendants, the Tulsa police officers
24 were arrested, and in their trial -- they filed a motion to
25 suppress the surveillance videos. And this goes to the privacy

1 argument that I believe Mr. Martin was talking about, there's
2 privacy interests in this material.

3 The Court there denied the motions because he said
4 the officers had no expectation of privacy in the work they
5 were conducting in the motel room, and if law enforcement
6 officers are granted privacy carrying out searches of citizens'
7 properties and not subject to this type of oversight, then
8 overreaching by officers would be encouraged or at least
9 protected. And all sorts of violations could be committed by
10 them without repercussions for the law enforcement officers.

11 The court said no expectation of privacy should be
12 recognized that it would allow these defendants or any law
13 enforcement officers to carry out alleged activities in secret.

14 So they were exercising their authority granted them
15 by the state to enter these premises, and they should be
16 expected to be monitored to ensure that that power that they
17 have comports with the requirements of our Constitution.

18 The same thing here. The TSA officials, they have no
19 expectation of privacy in the work they're doing in the public
20 area of the airport, so giving that to them wouldn't serve any
21 constitutional or any social interests.

22 And it's like the -- You know, Mr. Martin is trying
23 to argue that they have some kind of right to privacy in what
24 they're doing in this public area of the airport. And I think
25 the Wells court states it very well, that police officers or

1 any kind of government officials, in carrying out these types
2 of activities, their work, basically, don't have that kind of
3 expectation of privacy.

4 THE COURT: Well, but I don't know if he's really
5 going to go on the privacy route as much as -- I mean, the
6 whole reason you've got this is security, and everybody's
7 antennas are a little bit up at these places, and if everybody
8 doesn't conform it's sure going to bog things down. I mean,
9 it's hard enough getting through airports as it is, and if
10 you -- if you have everybody acting this way, then it's going
11 to bog you down. So there is a premium or a value in everybody
12 just doing what they're told. And then if somebody doesn't, at
13 what point does the security concerns get heightened to the
14 point that they satisfy the reasonableness standard? It seems
15 to me that's a fairly low standard.

16 MS. BOELCKE: I don't think it's that low. I don't
17 think it's as low as they would have it be, and I don't think
18 it's as -- when you have -- I don't think it's reasonable when
19 you have a policy --

20 THE COURT: If he started cursing at the TSA people
21 and filming, would you agree that then they -- it may meet the
22 reasonableness standard?

23 MS. BOELCKE: If he was assaulting them, I would
24 agree. If he's mumbling under his breath obscenities, I don't
25 think I would call that a heightened reason to call in

1 security. But if there's an assault happening --

2 THE COURT: Verbal assault?

3 MS. BOELCKE: Probably a verbal assault. You know,
4 threatening, you know, going beyond just speaking with them.

5 THE COURT: All right. Anything else on the First
6 Amendment issue?

7 MS. BOELCKE: We didn't actually touch on the
8 elements. Do you want to touch on the elements?

9 THE COURT: Please. Yeah.

10 MS. BOELCKE: Yes?

11 THE COURT: That would be fine.

12 MS. BOELCKE: Okay. The first element, of course, is
13 engaging in the constitutionally protected activity, and I
14 think we've addressed that, which is videotaping government
15 officials in a public area in the airport. I think that's the
16 right -- the right that Mr. Mocek had and that he was asserting
17 in this case.

18 And I do think there are cases which support that he
19 was engaged in a constitutionally protected activity at the
20 time.

21 If he suffered an injury, that would chill a person
22 of ordinary firmness from continuing to engage in the activity.
23 Because the defendants tried to take his camera and called in
24 police officers to have him arrested and seized his property, I
25 think that's definitely an injury that would chill a person

1 from continuing to engage in the activity.

2 Finally, that the defendant's adverse action was
3 motivated as a response to plaintiff's exercise of
4 constitutionally protected conduct. Plaintiff alleged the
5 reason that the TSA officers called the police to arrest him
6 was because he was taking photographs in a, quote, threatening
7 manner, quote, taking pictures of all of us, won't put his
8 camera down, and was creating a disturbance. Defendant Romero
9 tried to take Mocek's camera. And the TSA did nothing to
10 indicate that Mocek was breaking the law until he began filming
11 the officers. Only when Mocek challenged the notion that
12 taking pictures was prohibited did defendant Schreiner claim
13 that plaintiff was hostile, belligerent, and taking photographs
14 in a threatening manner. Mocek never refused to leave the
15 airport and he never disobeyed other than the stop-filming
16 order by the TSA agents.

17 You know, the allegations in the Complaint showed
18 that he was calm, not disruptive --

19 THE COURT: Do you agree with Mr. Martin, that I can
20 rely upon the additional facts that are stated in the full
21 reports that are attached to his motion?

22 MS. BOELCKE: No. I would object to the admission of
23 those statements, Your Honor.

24 THE COURT: You think I'm stuck with just the facts
25 you pull out of the reports -- the statements, rather than --

1 rather than looking at the full statement?

2 MS. BOELCKE: Yes, Your Honor. I think if those
3 statements are allowed in, which are outside the record, then
4 Mocek's videotape should be allowed in. I mean, that's -- this
5 is the evidence we have from the -- from the incident, and so
6 these are witness statements.

7 THE COURT: Now, he said that you refer to these
8 statements in your Complaint and, therefore, because you refer
9 to them in the Complaint and are summarizing them I can look at
10 the -- I can look at the entire statements. Your thoughts
11 about that?

12 MS. BOELCKE: I don't believe in a motion to dismiss
13 the defendants can bring in extra evidence, and usually when
14 that's done the motion is converted into a motion for summary
15 judgment and then the plaintiff --

16 THE COURT: Well, the Tenth Circuit has some limited
17 law that if you, for example -- if it's a contract and you're
18 suing for breach of contract and you refer repeatedly to the
19 contract and it's clear that you're basing it on the written
20 contract, if the defendant wants to bring in the written
21 contract and there's no dispute about the genuineness of the
22 copy the Court can consider that on 12(b)(6). I do -- In
23 securities cases, I can look at the K1, S1, or something like
24 that, if the plaintiff is continuing to refer to it.

25 If you refer to these statements, why wouldn't this

1 come under that same doctrine?

2 MS. BOELCKE: Well, I don't think the statements by
3 the defendants were -- are the basis of our Complaint
4 necessarily, so they're probably more tangential to the
5 Complaint than a contract would be in a case on a contract or a
6 securities case, where the entire case rests on that one
7 document. And because the plaintiff refutes what those
8 statements say, the content of the -- the content of the
9 statements themselves, as opposed to a contract, which is --
10 can't be -- the contents of the contract can't be disputed,
11 although the interpretation of it could be.

12 THE COURT: All right. Anything else you want to say
13 on the constitutional-violation prong of qualified immunity
14 before we move to clearly established?

15 MS. BOELCKE: No. That would be it, Your Honor.

16 THE COURT: All right. What do you want to say on
17 clearly established? What do you think your closest Supreme
18 Court or Court of Appeals, Tenth Circuit Court of Appeals case
19 is going to be?

20 MS. BOELCKE: For me, Your Honor, on the Fourth
21 Amendment or on the First Amendment?

22 THE COURT: No. First Amendment. I mean, what are
23 you going -- What is your -- What is it that you think gives
24 the clearest indication to TSA officers that they can't stop
25 filming in a nondisturbance situation?

1 MS. BOELCKE: I believe it would be the cases -- the
2 U.S. Supreme Court cases that allow an individual the right to
3 gather information and news in a public place.

4 THE COURT: Are any of those in a nonpublic forum?

5 MS. BOELCKE: There was a case that was in a hallway
6 in a government building, which I don't believe the hallway in
7 the building is a traditional public forum. I can't really
8 tell you where the other ones were, but I do recall that one.

9 THE COURT: And how about the Tenth Circuit? What
10 would you say is your closest Tenth Circuit case to this?

11 MS. BOELCKE: Hold on.

12 I don't believe there's a -- we have cited any Tenth
13 Circuit case directly allowing -- speaking to allowing
14 videotaping of police officers, but I would look to the
15 reasonableness of the conduct, given that the police officers
16 videotape and audio tape every instance they have with the
17 public, and I think that that talks to the reasonableness of
18 allowing the public to also have a right to videotape.

19 THE COURT: All right. Anything else you want to say
20 on the clearly established or anything else on the First
21 Amendment issue?

22 MS. BOELCKE: No, Your Honor.

23 THE COURT: All right. Thank you, Ms. Boelcke.

24 MS. BOELCKE: Thank you.

25 THE COURT: All right. Mr. Martin.

1 MR. MARTIN: Your Honor, if it's possible, can I just
2 clean up a couple issues --

3 THE COURT: Certainly.

4 MR. MARTIN: -- that were discussed?

5 The expectation of privacy. I don't recall
6 mentioning it. If I did, it was a mistake. And certainly not
7 in our briefing, so expectation of privacy is not an issue in
8 this case as far as we're concerned.

9 The fact that plaintiff's counsel is willing to admit
10 that Mr. Mocek did not show any purpose takes viewpoint
11 discrimination out of this case, it's done. I mean, at this
12 point, as you indicated, there was several reasons why they
13 called the local police. We called it disruption. You called
14 it preventing the process from bogging down. And then
15 security.

16 And the fact that they had these reasons for calling
17 the local police is simply reasonable, because, again, these
18 guys are not held to a standard, Malley v. Briggs. You know,
19 clearly incompetent is the standard. It's not clearly
20 incompetent for them to call somebody to find out what's going
21 on with this individual.

22 As far as the statements go, paragraph 75 is
23 entitled, in the Complaint, Breedon's statement, and then it
24 goes on for a full page of the Complaint, a summary of his
25 statement. Paragraph 77 is Schreiner's statement. That's

1 probably only about three-quarters of the page the Complaint
2 goes on.

3 So if the plaintiff is allowed to summarize those two
4 statements, certainly we're allowed to provide you with what
5 the statements actually say.

6 Again, your question concerning what are the closest
7 cases. And we get back with a very general Supreme Court case
8 that I believe talked about newspaper reporters and was more in
9 that context, of what they had a right to do and what they
10 didn't have a right to do, but none of it had to do with TSO's.
11 There is no Supreme Court case that I'm aware of that talks
12 about police officers in a public place. It was more about
13 looking at meetings, whether they could view meetings or
14 videotape meetings or videotape other interaction, often in a
15 newspaper-reporting-type context. And again, those are just
16 too far removed from what we have here.

17 What we have here is videotaping nonlaw enforcement
18 agencies -- these guys are TSO's -- in a nonpublic forum, a
19 security checkpoint, and the recording was an alternative
20 screening procedure, which, again, is specifically done for
21 security purposes.

22 So it's our position that there's, one, there's no
23 constitutional violation of the First Amendment, and, two, it's
24 not clearly established.

25 And that's all I have on the First Amendment, Your

1 Honor.

2 THE COURT: All right. Thank you, Mr. Martin.

3 Well, I'm going to take this under advisement, the
4 First Amendment issue, but I'm inclined to think that it's at
5 least going to fall on the clearly established. I think
6 there's enough play in the reasonableness standard that, even
7 assuming the facts as I think I must, that there was no
8 disruption here.

9 I think that the lack of any viewpoint discrimination
10 is going to make it either, A, there was no violation of the
11 First Amendment, or I go ahead and skip over that or also find
12 that there was no clearly established law.

13 And I think the TSA situation is different enough
14 from the police filming cases, which there's a split in the
15 circuit on, and some differences there, that I think it would
16 be difficult to say that there's been a violation of clearly
17 established law.

18 So I'm inclined to grant that portion of the motion,
19 although I may not exactly know how I'm going to get there at
20 the present time, whether it's necessary to address the
21 constitutional violation or at least address it enough to state
22 correctly what the issue is in this case, but I think it's at
23 least going to go out on clearly established.

24 All right. If you want to go, Mr. Martin, to the
25 next issue, the Fourth Amendment.

1 MR. MARTIN: Yes, Your Honor. The Fourth Amendment
2 is considerably simpler in this case, because, of course what
3 you have here is allegations that the TSO's were somehow
4 involved with the arrest, the seizure of Mr. Mocek and his
5 property and then damage to his camera. And, fortunately, in
6 the pleadings themselves, dispute that -- those allegations or
7 those assertions -- those conclusory assertions, I guess I
8 should say.

9 The Complaint itself indicates that once the law
10 enforcement showed up, that they took control of the situation.
11 And, in fact, the Complaint says that when law enforcement
12 initially showed up they asked Mr. Mocek to comply with the
13 TSO's or he would be removed from the airport.

14 There was no mention of arrest, no mention of
15 seizure, no mention of searches. And when Mr. Mocek indicates
16 he won't comply, the local police ask him again to comply, and
17 then finally the local police ask Mr. Mocek for his
18 identification. Mr. Mocek refuses to provide that. And that's
19 what it says in the Complaint, and the Complaint specifically
20 indicates that the lead local police officer, a Mr. -- Officer
21 Dilley, tells Mr. Mocek, "All right, listen, if you don't
22 provide us ID, we're involved in an investigation here, we're
23 going to have to arrest you." And at that point the Complaint
24 says, "Officer Dilley changed his mind" -- or "Officer Dilley
25 changed his mind" -- it actually uses those words -- "and

1 decided that he would arrest the plaintiff for failing to show
2 his ID."

3 So there's no involvement whatsoever, no personal
4 participation by the individual federal defendants as required
5 by Iqbal, and because there's no personal participation there's
6 no constitutional violation. No constitutional violation, of
7 course, then it's clearly established. And we've provided an
8 Eighth Circuit case, Green, that runs along similar facts,
9 similar issues of proximate cause and causation and comes to
10 the same result.

11 Add the bottom line is, when we get -- not only is
12 there no constitutional violation, of course, then it's not
13 clearly established because the plaintiffs have not cited a
14 single case in which merely summoning law enforcement is enough
15 to cause a Fourth Amendment violation.

16 And that's really all I've got on that issue, Your
17 Honor, subject to your questions.

18 THE COURT: All right. Let me talk to Ms. Boelcke
19 first, and then I may have some questions. Thank you,
20 Mr. Martin.

21 Ms. Boelcke, I guess -- Let's take it out of the --
22 Let's take it out of the -- what's unusual about this case.
23 We've got two governments, state and federal here, so let's'
24 just take it that somebody calls the cops because they don't
25 like something that somebody's doing, and clearly that person

1 can do it. They're protected by the First Amendment.
2 Somebody's complaining because there's a parade going down
3 Central protesting the war, and so it's clearly First
4 Amendment, and some shop owner doesn't like it, calls the
5 police, and APD shuts the parade down.

6 Would the -- Would a plaintiff be able to sue the
7 shop owner, saying, "You called the cops and tried to suppress
8 First Amendment"? Would you be able to do that?

9 MS. BOELCKE: You would only be able to do it if --
10 Like in a malicious abuse of process under state law or a
11 malicious prosecution claim under federal law, where the person
12 knew what they were saying was false or there was reckless
13 disregard for the truth of what they were saying. And that's
14 basically the crux of this matter, is where the defendants here
15 caused -- set in motion a series of events that caused the
16 ultimate arrest when they know --

17 THE COURT: Well, there's certainly a but-for
18 causation. I mean, you know, there's a but-for in the sense
19 that if TSA hadn't called APD, yes, they would have -- they
20 wouldn't have shown up --

21 MS. BOELCKE: True.

22 THE COURT: -- but the Constitution requires this
23 sort of direct and personal involvement in the constitutional
24 violation.

25 It seems to me that once -- once they call somebody,

1 whether they were dead wrong or not, once they call they don't
2 violate the Constitution. Yes, there's a but-for, but they
3 don't violate the Constitution, that -- Let's just say APD
4 started just, you know, macing Mr. Mocek and beating him.

5 Could they really be held for excessive force, for
6 example, the TSA officers?

7 MS. BOELCKE: Probably --

8 THE COURT: They don't know -- I mean, they didn't --
9 They probably didn't even have in their mind that the way to
10 end this thing was to ask for his ID and him not provide it.
11 And I'm not sure that that would have crossed TSA's mind. Do
12 you?

13 MS. BOELCKE: I don't know, but I do know that there
14 are cases, like Snell versus Tunnell, where when they look at
15 the qualified immunity and if the officers, the complaining
16 officers, so to speak, if they're using information they know
17 to be false or to get another public official, like, let's say,
18 a magistrate, to get a warrant, you know, as in Franks versus
19 Delaware, if they're getting a warrant or they're causing --
20 telling information to the police which causes them to arrest
21 when they know that information, they know it's not an actual
22 violation of the law, they can be held responsible for that.
23 That's enough involvement for them to be --

24 THE COURT: So that's what you're relying on, is the
25 collective knowledge doctrine? Grouping all these police

1 together, TSA, APD, there's no distinction here?

2 MS. BOELCKE: No, it's not -- I don't -- I don't know
3 if I'm doing that. What I'm looking at is the case Wulf versus
4 City of Wichita, which is a Tenth Circuit case. So when you
5 have a defendant who -- It's -- The defendant doesn't have to
6 personally make the arrest. This actually happened in the Buck
7 case, which involved the protest here in Albuquerque and the
8 Iraq war case, and we went to the Tenth Circuit and talked
9 about -- That was supervisory liability, but it was -- it also
10 relied on Snell, where the officer either directed the arrest
11 of somebody and another officer did it or gave information to
12 another officer that they knew was false. These TSA defendants
13 knew that he had not -- there was no reason to tell him to put
14 down the camera, to stop filming.

15 So by calling in the Albuquerque Police Department
16 and saying they're not -- they're not -- he's not obeying an
17 order, a valid order when it's not a valid order, they set in
18 motion the facts that resulted in his arrest.

19 You know, without their complaint and without their
20 calling in the Albuquerque aviation police there wouldn't have
21 been an arrest.

22 THE COURT: Well, there's certainly but-for causation
23 here, but I'm wondering if that's enough. I mean, generally,
24 if you have a group of officers, say, at a scene and there's an
25 unlawful arrest or there's excessive force, that before you can

1 hold all 15 officers liable for what one officer is doing there
2 has to be an opportunity to intervene and to stop the
3 unconstitutional activity, so you have to be personally
4 involved in the unconstitutional activity.

5 I'll have to look at the Complaint and the
6 allegations closely, but my sense is that once the APD was
7 called there was no more involvement with TSA, they were just
8 out -- they were back to screening passengers. Am I wrong?

9 MS. BOELCKE: I believe they were there during the
10 entire time that Mr. Mocek was involved with the Albuquerque
11 aviation police. That's my belief without reading the
12 Complaint in detail.

13 THE COURT: All right. Anything else on the Fourth
14 Amendment?

15 MS. BOELCKE: No. We rest on what we wrote in our
16 brief.

17 THE COURT: All right.

18 MS. BOELCKE: Thank you.

19 THE COURT: Thank you, Ms. Boelcke.

20 Mr. Martin, let's -- Let's say that I on the First
21 Amendment issue do what you want me to do, and that is jump to
22 the clearly established and say the law's not clearly
23 established, dismiss the First Amendment on Pearson grounds.

24 MR. MARTIN: Yes, sir.

25 THE COURT: It sounds to me like what Ms. Boelcke is

1 saying is her Fourth Amendment claim is dependent on there
2 being an unlawful order. Am I going to have to decide that
3 constitutional issue that we've avoided now under Pearson to
4 decide whether there's a Fourth Amendment violation?

5 MR. MARTIN: No, Your Honor, because when you look
6 at -- take a close look at the Complaint -- and I'm citing now
7 paragraph 54, and it specifically says, "Dilley then changed
8 his mind about escorting Mocek out of the airport, stating he
9 was going to need to see Mocek's I.D." -- Dilley is the
10 police -- "or else he was going to arrest Mocek for concealing
11 ID."

12 So the bottom line here is that when the police
13 showed up they had no intent of arresting Mr. Mocek. And
14 how --

15 THE COURT: Is that crucial, though, whether they
16 are -- I know it would be for the Fourth Amendment violation,
17 but is it crucial -- I guess we've already decided the First
18 Amendment violation, and we pretty much decided that was
19 irrelevant for the First Amendment violation, right, whether
20 they arrested him, escorted him out --

21 MR. MARTIN: Yeah, that's all Fourth Amendment.

22 THE COURT: The key point there is just telling him
23 not to film, right? That's the key point?

24 MR. MARTIN: Correct.

25 THE COURT: So here on the Fourth Amendment violation

1 the significance of him changing his mind is what?

2 MR. MARTIN: The significance of changing his mind is
3 because part of the plaintiff's allegations seem to be --
4 again, I don't want to put words in their mouth -- but seem to
5 be that the individual federal defendants told the airport
6 securities police that they should arrest plaintiff. Well,
7 clearly, that's not the case, because here Mr. -- or Officer
8 Dilley had no intentions of arresting him. In fact, if he
9 complied with the TSO's he was going to be able to do whatever
10 he wanted to do. If he didn't, he was going to be escorted out
11 of the airport.

12 So how can my clients, the individual federal
13 defendants, be held liable for something that clearly the
14 police on their own decided to do?

15 THE COURT: Do they allege in their Complaint that
16 they called APD over to arrest him?

17 MR. MARTIN: No, they do not.

18 THE COURT: They do not. What is the -- What is the
19 reason that they called -- that they, given the Complaint --

20 MR. MARTIN: I'll have to go back and find that for
21 you, Your Honor. It says "Breedon" -- Breedon's one of my
22 clients -- "called for police assistance. In the meantime ...
23 Schreiner, a TSA security supervisor, and ... Romero, a TSA
24 manager" -- again my clients -- "approached the security
25 checkpoint..." So it doesn't give any reasoning for why they

1 called the local police.

2 And again, to your earlier point, and it was maybe
3 slightly on point about the location, there is nothing in the
4 Complaint about the location of the TSO's while the police take
5 it over. Now, again, we did add that statement from
6 Mr. Schreiner, one of the two defendants' exhibits, and he says
7 what they did is they went over and they talked to -- Mr. Mocek
8 had a traveling companion, and when he came to the security
9 checkpoint he gave his ID to the traveling companion, in theory
10 so he could be truthful about saying, "I don't have any ID"
11 when he walked up.

12 So the traveling companion apparently was concerned
13 about Mr. Mocek being -- you know, dealing with the police, and
14 he asked some questions, and the TSO's went over and talked to
15 him about the situation, but then told him, "You'll have to
16 talk to the police about it, because they're handling the
17 situation." So that's where the TSO's were during this
18 process.

19 THE COURT: They were -- I guess I'm picturing the
20 Albuquerque airport where those little kind of podiums are.
21 That's where this took place?

22 MR. MARTIN: Yes, Your Honor. When you first walk
23 through the podiums, right behind the podiums is probably 10 to
24 20 feet of space. That's where they were. That's where most
25 of this activity took place. And again, people came from all

1 different directions, because the police are stationed in some
2 areas, the supervisors in others. And, of course, Mr. Breedon
3 was right behind the main line of guys who take your ID and
4 check on your --

5 THE COURT: He's always there?

6 MR. MARTIN: He or someone else like him is always
7 there. So he's the first guy there. He was going to take care
8 of the --

9 THE COURT: Which one was the person at the podium?
10 Which one of these three?

11 MR. MARTIN: Actually, are you meaning the first
12 gentleman he talks to?

13 THE COURT: Right.

14 MR. MARTIN: That's Rodriguez. He's not involved in
15 this case.

16 THE COURT: He's not involved?

17 MR. MARTIN: Because what he does is stays there and
18 continues dealing --

19 THE COURT: He keeps working?

20 MR. MARTIN: He hands off to Breedon. Breedon is
21 going to handle the alternative screening process. He's the
22 supervisor. Now, of course, his job is to supervise all those,
23 and he can't do that now because he's got to take care of
24 Mr. Mocek. And it's when he pulls out the camera and asks him
25 not to film that he calls for police assistance, and that's

1 when police assistance arrives.

2 And again, one of the statements, and we quoted in it
3 in our brief, specifically says, "and the police took over the
4 situation."

5 THE COURT: And the other two TSA people are who?

6 MR. MARTIN: They're supervisors.

7 THE COURT: Supervisors of Breedon?

8 MR. MARTIN: That's correct. They come -- Again, if
9 you're familiar with when you walk into the screening section,
10 to your far right -- I think we tried to guess it was about 40,
11 50 yards away -- to the right is where the supervisors are
12 sitting. They have some cameras. Again, we won't go into what
13 they have, but they have some other jobs that they're concerned
14 with. And of course when they hear a request for a local
15 police they immediately come, as well.

16 THE COURT: What about -- What about Ms. Boelcke's
17 argument that -- She doesn't use this language, but it's
18 sounding to my ears like she's trying to use the collective
19 knowledge doctrine, that they could not make false statements
20 about -- as officers and pass it on to other officers who then
21 make the arrest.

22 MR. MARTIN: Again, we'd ask you to look at the
23 statements, because for the most part they use the -- "they,"
24 the plaintiffs -- use the TSA statements to refute some of the
25 allegations made by the police. Now, the big difference, of

1 course, happens to be the disturbance issue.

2 The TSO's consider this disturbance, as we indicated
3 in our pleadings, because of the large number of people they
4 now have to have involved in the situation. Not only do you
5 have the one guy who first would take your paperwork -- that's
6 your normal one -- but they get up to six folks from TSA
7 involved in this process of having to take care of Mr. Mocek.
8 That's a disturbance in their view; that they are not allowed
9 to do their normal job proceedings, but they have to handle and
10 put this much resources to one individual.

11 Now, of course, that's only one factor, as we talked
12 about; the security concern is the other one. Now, because
13 they have these two concerns they call the local police.

14 But I guess what we come back to at the end of the
15 situation is, even when they provide that information to the
16 local police the local police are not going to arrest
17 Mr. Mocek. The decision to arrest does not occur -- and they
18 said he changed his mind -- until he refuses to provide his ID.

19 And how the individual federal defendants know that
20 when he's asked twice to provide his ID, that the second time
21 he's going to invoke his rights and ask to see an attorney, I
22 mean, that's just implausible.

23 And, of course, that's what we get into with
24 pleadings, isn't it?

25 THE COURT: Well, if you -- If you had -- If you had

1 the TSA -- A lot of times we have these joint, oh, say,
2 protests or state drug task forces so there's a mixture of
3 federal and state folks. I wouldn't think that it would make a
4 lot of difference under the Fourth Amendment whether you were a
5 federal person, and the state person or the local person is
6 violating somebody's constitution rights. The duty to
7 intervene's going to be the same, right?

8 MR. MARTIN: I agree, Your Honor.

9 THE COURT: So if -- If they -- If they saw the APD
10 officers arresting him for not producing his ID, there has to
11 be -- before the police officers can do that, they have to --
12 there has to be some reasonable suspicion of criminal activity,
13 correct?

14 MR. MARTIN: That's right, Your Honor. And, you
15 know, we cited a case -- I think it's a footnote in our
16 reply -- that talks about the elements under New Mexico law for
17 failure to provide an ID, and it's pretty much, you're asked --
18 there's an ongoing investigation, you're asked for ID, and to
19 prevent that investigation from continuing you fail to provide
20 it. So --

21 THE COURT: But if the TSA people knew there was no
22 criminal activity, how could they -- how could they then allow
23 APD to use the existence of criminal activity to ask for the
24 ID?

25 MR. MARTIN: Again, I'm not quite following you, I

1 don't think, Your Honor.

2 THE COURT: Well, it seems that the APD's actions is
3 dependent upon there being criminal -- at least a reasonable
4 suspicion of criminal activity.

5 MR. MARTIN: I guess I would disagree here in a
6 security context. When they get there, they're not going to
7 arrest him. They're coming to see if there's a security or a
8 disturbance concern. The disturbance is not what they're
9 looking for as criminal activity. It's more, let's move this
10 process along. Remember what the goal of an airport is, is
11 safe travel, but also moving people through these lines.

12 So they call not necessarily because they want
13 Mr. Mocek arrested, but because they want --

14 THE COURT: But doesn't the APD need the existence of
15 reasonable suspicion of criminal activity to ask for the ID?

16 MR. MARTIN: They need it for their investigation,
17 and the investigation -- Again, what their exact standard is --
18 again, my guys aren't law enforcement officials, so I don't
19 think they're really involved. I guess I take it more as an
20 example of someone on the street calling police because there's
21 some disturbance on the street, and then when the police
22 arrives the person who's making the disturbance takes a swing
23 at them and they arrest them for taking a swing. Well, that's
24 what we have here.

25 They call the police because of a disturbance and

1 security concerns. Not necessarily to have him arrested. And
2 it's clear from the Complaint the police had no intent of
3 arresting him, and it's not until they ask for ID because
4 they're doing this type of investigation that, in fact, they
5 decide to arrest him.

6 THE COURT: Well, I guess I'll have to look a little
7 bit at the state law. I don't -- I'm not familiar enough with
8 that requirement to produce ID. Can they just ask for ID for
9 any purpose?

10 MR. MARTIN: You're right, Your Honor, I do not
11 consider myself an expert in that issue either. Although, I
12 guess I -- Excuse me. What we're really talking about here is
13 proximate cause, and that's the Green case we cited out of the
14 Eighth Circuit, where a school official called the local police
15 and told them -- actually told them that he's creating a
16 disturbance and we would like this individual to leave, you
17 know, some type of public -- I think it was some type of a
18 meeting about school issues.

19 And then when the police got there they made their
20 own determination concerning the individual and they asked him
21 to leave and he refused and they arrested. And the Eighth
22 Circuit said, no, you can't blame the individual for merely
23 calling the police and giving his opinion of what the situation
24 is.

25 THE COURT: I'll have to study Green, but was the --

1 It seems to me the difference here is that you -- I'm still
2 grappling with Ms. Boelcke talking about this
3 collective-information doctrine and this intervention doctrine.
4 The TSA people remained at the location, and if it did require
5 reasonable suspicion of criminal activity to ask for the ID,
6 then it concerns me a little bit that the TSA people -- they
7 didn't think there was any criminal activity. We already kind
8 of dealt with that as far as viewpoint discrimination. They
9 didn't know why he was acting the way he did.

10 MR. MARTIN: I guess I go back to, Your Honor, these
11 are not law enforcement agents. They're not making a
12 determination as to whether there's criminal activity or not.
13 They're simply concerned with disruptions and security. It's
14 the police who have to make the decision whether there's
15 criminal activity or not.

16 THE COURT: Well, maybe you're right. I haven't
17 thought TSA agents -- I don't know if they are law enforcement
18 agents or not. What are they?

19 MR. MARTIN: We've provided you a cite in our brief
20 that specifically indicates they are not law enforcement
21 agents. They do not have the right to make arrests; they don't
22 carry weapons. They're just TSA officials. They are federal
23 officials to move people through the lines of getting on
24 airplanes safely and securely.

25 THE COURT: And they don't make any arrests? They

1 call police for that?

2 MR. MARTIN: That's right. We've actually cited that
3 for you, the statutory cites that say the TSA is required to
4 have prior arrangements with either local police or private
5 security agencies to take care of these type of issues, because
6 the TSA's are neither trained nor authorized to do such things.
7 So they wouldn't be making law enforcement decisions. There's
8 no probable cause issues for these guys.

9 THE COURT: So if somebody were to just burst through
10 the line and try to get through they would not --

11 MR. MARTIN: They call law enforcement officials. I
12 mean, I'm not saying one of them might not tackle the guy, but
13 they have no arresting authority. They're holding them for
14 them. It would be like you or me making a public arrest. They
15 are just holding them until the local law officials show up.

16 THE COURT: What kind of training do they have? Do
17 they have any training for the pat-downs? Do they have
18 training in Fourth Amendment at all to say, well, you can pat
19 down this much if you have this much amount of suspicion; if
20 you have this much, you can do some more intrusive or --

21 MR. MARTIN: My understanding is, and from what I've
22 seen is they have a number of -- I like to call them flow
23 charts. If this happens, you go here; if this happens, you go
24 here. Fairly simple, fairly basic.

25 I do have somebody from the TSA here who can provide

1 a lot more information for you on this issue than I can, but
2 I've asked the same question.

3 THE COURT: But that's the limit of it, they sort
4 of -- their, say, legal training and Fourth Amendment training
5 is this flow chart with pat-downs?

6 MR. MARTIN: Those type of issues, yes. And the
7 bottom line is, if in doubt, call the local law enforcement,
8 because they're the experts on that area. That's what they're
9 there for.

10 THE COURT: They don't get any training on excessive
11 force, arrest, any of those areas?

12 MR. MARTIN: Other than you're not supposed to do any
13 arrests because you're not law enforcement, you're not supposed
14 to do anything beyond the touchdown -- touch -- you know, the
15 pat-downs, so, you know, there can't be excessive force.

16 THE COURT: Yeah. And I assume they don't get any
17 training in laws, that somebody could be arrested for doing
18 different things at the -- at the checkpoint?

19 MR. MARTIN: Again, Your Honor, that's probably not
20 something I should be speaking about. I don't -- I've asked
21 some of those questions and got some basic answers, but I don't
22 have enough specifics for that area.

23 The big thing that we've cited in our briefs is that
24 they are not law enforcement officers and, therefore, do not
25 have that authority, and they're required to have local law

1 enforcement present to do those type of activities. That's
2 really what you have in front of you.

3 THE COURT: All right. Anything else on the Fourth
4 Amendment?

5 MR. MARTIN: No, Your Honor.

6 THE COURT: Well, I'll take this under advisement as
7 I did with the First Amendment, but I'm inclined to think that
8 once -- once the TSA calls law enforcement, that they are much
9 in the same situation as a private citizen calling law
10 enforcement, that they're not going to be responsible for any
11 of the alleged unconstitutional activity of the police at that
12 point.

13 There may be some other claims, like malicious abuse
14 of process or something like that, but I don't -- I don't see
15 it as being a Fourth Amendment violation. I think you've got
16 to participate personally and directly in the constitutional
17 violation. And if they're not really trained as another police
18 officer to intervene in a rather, perhaps, subtle arrest on
19 state law charges, I'm not sure that they can be responsible,
20 so I think that at least my initial reaction here is that I
21 should grant the motion to dismiss on the Fourth Amendment
22 violation, as well. But I'll take that under advisement.

23 And the last one is just a -- is just a request for
24 declaratory relief. Am I not mistaken?

25 MR. MARTIN: That's correct, Your Honor.

1 THE COURT: And I guess that would just follow from
2 the others, that if I'm not -- if I'm either not finding -- I
3 guess it's really qualified immunity on both grounds, then,
4 particularly if I'm finding it's not clearly established, I
5 shouldn't be making a declaratory judgment of those rights, as
6 well.

7 MR. MARTIN: That's what we would ask, Your Honor.

8 THE COURT: All right. Ms. Boelcke, on the
9 declaratory judgment, let's say I did what I am inclined to do
10 on the first two counts as to the federal defendants. What
11 would I do -- What would you -- Is there anything left to do as
12 far as a declaratory judgment, or should I -- if I do what I am
13 inclined to do on the first two, should I also dismiss the
14 third count as to the federal defendants, or is there anything
15 else you need there?

16 MS. BOELCKE: I believe the claim for a declaratory
17 judgment against the federal defendants was against them in
18 their official capacities, and the qualified immunity only goes
19 to the claims against them in their individual capacities, so I
20 believe the count would still remain as a claim against them in
21 their official capacity.

22 THE COURT: All right. Tell me what -- Tell me what
23 would be left. If I were to grant qualified immunity on the
24 First and Fourth Amendment, what would be left against the
25 officers in their official capacity?

1 MS. BOELCKE: If the policies that they were
2 following -- You know, they could have qualified immunity and
3 you could still have a claim against the government in the
4 official capacity for a violation of a constitutional amendment
5 even if they got a qualified immunity individually, so I
6 believe we have claims against the TSA in its official
7 capacity, and those claims were not raised in this motion,
8 and --

9 THE COURT: What are those claims? What are you
10 suing TSA --

11 MS. BOELCKE: Let me see.

12 THE COURT: -- effectively for? What is it you would
13 want the Court to declare?

14 MS. BOELCKE: That the citizens have a right to use
15 cameras and other recording devices in the publicly accessible
16 areas of the Albuquerque airport and stopping asking for an
17 injunction to not allow them to retaliate against individuals
18 who seek to exercise that right by using cameras or other
19 recording devices.

20 THE COURT: Read that one again.

21 MS. BOELCKE: This is on page 26 of the Complaint.
22 It's paragraph B. "Issue a court order enjoining Defendants
23 from prohibiting the use of cameras and other recording devices
24 in publicly accessible areas of the Albuquerque airport," and
25 stop them from retaliating against individuals who seek to

1 exercise their right to use cameras and other recording devices
2 in the publicly accessible areas of the airport.

3 And then paragraph C is, "Issue a court order
4 requiring Defendants to undertake training and other
5 prophylactic measures to ensure that the Defendants'" do not
6 keep people from exercising their rights in those areas.

7 THE COURT: All right. So you think that this motion
8 doesn't touch that portion?

9 MS. BOELCKE: Not on the official policy claim,
10 because, as I said, you can have -- an officer could have
11 qualified immunity personally; however, there could still be a
12 constitutional violation, maybe the right -- where the right
13 wasn't clearly established, but they still violated the
14 plaintiff's constitutional rights, which can lead to a Monell
15 or a policy-type claim.

16 THE COURT: All right. Anything else on the
17 declaratory judgment, Ms. Boelcke?

18 MS. BOELCKE: No. That would be it, Your Honor.

19 THE COURT: All right. Thank you, Ms. Boelcke.

20 MS. BOELCKE: Thank you.

21 THE COURT: Mr. Martin, are you in agreement with
22 Ms. Boelcke, that the qualified immunity only covers the
23 individual claims, so we're going to have to address any sort
24 of official claims on another day?

25 MR. MARTIN: No, Your Honor, there's no APA claim

1 here; there's no claim that the United States did not follow
2 its own procedures.

3 As I read the Complaint, it's a Complaint against all
4 defendants in their official capacities. It's not against --
5 Now, I agree, an official Complaint against a defendant is
6 generally against the organization itself, but this asks for
7 declaratory relief as it relates to the earlier claims, and,
8 obviously, if those claims go away there's no declaratory
9 relief, in fact, available to the plaintiff in this case.

10 THE COURT: Well, what about just on a simple level?
11 Your motion only touches the individual claims on qualified
12 immunity, right?

13 MR. MARTIN: My motion is for the individual claims,
14 but also says -- addresses very briefly the declaratory relief,
15 that if -- there is no claims against these individuals because
16 there is no constitutional violation and it's not clearly
17 established that the Court should not be granting the
18 declaratory relief.

19 THE COURT: So what Ms. Boelcke read as her relief is
20 not against these individuals, it's against TSA, effectively?

21 MR. MARTIN: It says "claim for equitable relief
22 against all defendants in their official capacities." Again,
23 TSA is not named as a defendant in this case, but if you name
24 individuals in their official capacity you're really suing the
25 United States.

1 THE COURT: TSA, right.

2 MR. MARTIN: So, again, our point is, if there's no
3 constitutional violation and it's not clearly established if
4 qualified immunity is appropriate in this case, then there
5 should also be no declaratory relief. It at least appears,
6 from what Ms. Boelcke's reading in some of it -- I mean,
7 obviously, to do a training and whatnot, that doesn't even have
8 to do with a Bivens claim. That's got to do with a 1983 claim
9 and a Monell claim.

10 I assume she's talking about the state defendants
11 there and not the individual federal defendants. So I think
12 she's reading it much broader than what can actually apply to
13 U.S. defendants.

14 THE COURT: Well, let me -- Stay right there,
15 Mr. Martin.

16 But, Ms. Boelcke, it sounds to me like the relief
17 that's being asked, it would be against the TSA, but it
18 wouldn't be against these individuals, at least as a result of
19 the alleged violations. So if I find that there is no Fourth
20 Amendment and a First Amendment claim and the request here is
21 more against the TSA, is there really anything to declare as to
22 these individuals?

23 MS. BOELCKE: Not as to these individuals. And if
24 they're -- If you find there's no constitutional violation
25 occurred by the conduct of these individuals, then that --

1 there wouldn't be any reason for the declaratory relief. If
2 the motion is granted based on the fact that there is no
3 clearly established right --

4 THE COURT: Clearly established.

5 MS. BOELCKE: -- I think it's a different situation.

6 THE COURT: What do you think about that?

7 MR. MARTIN: That's an interesting question, Your
8 Honor. I'd probably have to look back at that and brief it. I
9 have not seen situations where the case goes away against the
10 Bivens individuals and because of their conduct declaratory
11 relief then follows on because the Court found not clearly
12 established.

13 THE COURT: I had a similar incident -- If you're
14 going to look at this, you might look at -- I had a case from
15 the Tenth Circuit. The case is called Kerns. Ms. Wild's
16 getting the number up. It's CIV-07-771. And the -- It's a
17 little bit different situation, but I had found -- I had found
18 that there was a genuine issue of material fact on the
19 constitutional violations, and the Tenth Circuit said, no, I
20 should have jumped directly to Pearson and the clearly
21 established. The problem was, there was still a state claim,
22 and so I had to say, well, I've already found there's a genuine
23 issue of material fact on the state claim. 296 is the one.
24 I'm not sure which one -- document 296.

25 Is that the one on remand?

1 MS. WILD: Yes.

2 THE COURT: Okay. So you might take a look at that.

3 MR. MARTIN: We'll take a look at it, Your Honor.

4 THE COURT: It's not on point, but it's a similar
5 situation, where even with Pearson I couldn't avoid deciding --

6 MR. MARTIN: The constitutional issues.

7 THE COURT: -- the constitutional, because of the
8 impact of some other issue in the case. That's one of the
9 things that is coming up a lot with Pearson, is, if you jump to
10 that second on just the federal Constitutional you often have a
11 bundle of claims and it's hard sometimes to avoid it even if
12 you've decided to avoid it.

13 MR. MARTIN: Yes, Your Honor. We'll take a look at
14 it. Would you like us to brief that with some supplemental
15 briefing for you?

16 THE COURT: Okay.

17 MR. MARTIN: All right. We'll put that together, if
18 it's all right, after Thanksgiving.

19 THE COURT: That's fine. That's fine.

20 Well, anything further you want to say on the
21 declaratory?

22 MR. MARTIN: I do not, Your Honor. Like I said, we
23 didn't spend a lot of time on that because our thoughts were,
24 if it goes away against the individuals, it certainly goes away
25 against everyone, because it was to do with individuals'

1 conduct.

2 THE COURT: Yeah, I don't want to put -- Let's say on
3 the first two I grant your motion, on the First Amendment and
4 the Fourth Amendment, and putting aside whatever I do -- what
5 then happens on the official-capacity claims? What goes --

6 MR. MARTIN: See, there aren't any official capacity.
7 The only official-capacity claim is declaratory judgment. The
8 government's not in this case other than the declaratory
9 judgment.

10 THE COURT: So these individuals are not sued in
11 their individual -- in their official capacity on the First and
12 Fourth Amendment claims?

13 MR. MARTIN: You cannot sue in a Bivens case official
14 capacity. Bivens specifically says it has to be against the
15 individual. And, of course, what that means is, the difference
16 here is, instead of, you know, the judgment fund paying for
17 judgments here, this comes out of the individual's pockets.
18 And that's why we take it so serious.

19 THE COURT: Is there any individual claim under
20 Bivens for declaratory relief?

21 MR. MARTIN: There is not, which is kind of
22 interesting.

23 THE COURT: Is case law clear on that?

24 MR. MARTIN: You know, again, we'll take another look
25 at that for you, Your Honor. But, no, Bivens -- Bivens -- You

1 can only do a Bivens case, a constitutional case, against an
2 individual in their individual capacity, so that's why I assume
3 plaintiffs didn't move to -- for declaratory relief against the
4 individuals, because you can't go for injunctive relief against
5 individuals. That makes sense, because they don't run the
6 place, they don't run the government. It's the government only
7 that can grant injunctive relief. And declaratory relief, of
8 course, is a form of equitable relief as opposed to monetary
9 relief.

10 THE COURT: All right. Well, I'm a little uncertain
11 as to how to deal with the declaratory, so I'll --

12 MR. MARTIN: I am, too, Your Honor.

13 THE COURT: -- just take that under advisement --

14 MR. MARTIN: Fair enough.

15 THE COURT: -- and think about it.

16 All right. Anything further on your motion,
17 Mr. Martin?

18 MR. MARTIN: No, Your Honor. Appreciate your time.

19 THE COURT: All right. All right. Well, I'm
20 inclined to grant it. I'm not sure what to do with that third
21 count, and I am going to take this under advisement. There are
22 some issues here I want to look at more closely, but I'm
23 inclined to grant that motion.

24 Now, I assume this is the first time that the Court,
25 at least I have seen you, but also Judge Black or any

1 magistrate judge or anybody.

2 I guess what I would be inclined to do is, to get
3 this case moving, because it's been around a little bit, is to
4 go ahead and set an initial scheduling conference, and then
5 I'll try to have this opinion to you by the time we get
6 together again, and that way -- I guess I'm inclined enough --

7 So you think that the end result, Mr. Martin, is that
8 you're going to be out of this case with this motion?

9 MR. MARTIN: That was our intent, certainly, Your
10 Honor. The individual federal defendants would be out, and
11 because there's no constitutional violations there can be no
12 declaratory relief, and, therefore, the United States is out
13 and the case would then become between the plaintiffs and the
14 local police.

15 THE COURT: If Ms. Boelcke wanted to get her
16 declaratory relief against the TSA she would have to name the
17 TSA?

18 MR. MARTIN: Again, that's something we're going to
19 have to look at, Your Honor. But, again, if --

20 THE COURT: Here's what I'm thinking is, is I'd like
21 to go ahead and get the case moving, because I think I know --
22 I think I'm going to be granting this motion as to your folks,
23 and so what I was going to do is set an initial scheduling
24 conference, get everybody going on the rest of the case, and I
25 guess my -- the question I'm having in my mind is whether I

1 should require you to participate in that at all. And I guess
2 if I'm about to grant the motion I'd be inclined not to. The
3 only downside to that is, if we find out that there's something
4 left, it may be -- it may create a difficulty down the road.

5 MR. MARTIN: Your Honor, we're certainly available.
6 We'll participate if you'd like, if that makes sense for what
7 you're saying.

8 I guess the bottom line is, of course, if you find
9 prong one, no constitutional violation, then certainly in both
10 the First and Fourth Amendment then clearly there can be no
11 declaratory relief, because that's what they're asking for,
12 that their conduct was, in fact, unconstitutional. So that
13 would be inappropriate.

14 Now, if you're only going to find prong two, that it
15 was not clearly established, then I think that's the issue we
16 need to take a second look at.

17 THE COURT: All right. Well -- And you'll send me
18 something?

19 MR. MARTIN: That, we will.

20 THE COURT: Okay. All right. Because it sounds like
21 you may be -- there's a possibility you may be writing me a
22 letter saying, well, you've got to decide both because of the
23 way this is teed up.

24 MR. MARTIN: We may, Your Honor.

25 THE COURT: Okay. All right. Well, I'll wait for

1 that. Why don't, though, for the present time, because I think
2 even if -- even if Ms. Boelcke agreed with you on the
3 reasonableness standard, and I'm not seeing any viewpoint
4 discrimination just because of the particular facts here, even
5 if I were to do both, I'm inclined to think there wasn't
6 either, A, a constitutional violation or a violation of clearly
7 established law. Why don't we not have you participate in the
8 preparing of the initial scheduling -- yeah, the JSR and the
9 pretrial order.

10 MR. MARTIN: Fair enough, Your Honor.

11 THE COURT: And so I'll just leave you out. And if
12 we find out down the road that you need to participate in some
13 way, then we'll figure out how to bring you back into the
14 picture.

15 MR. MARTIN: Appreciate it, Your Honor. Thank you.

16 THE COURT: How about you? Let me start with you,
17 Ms. Boelcke. Do you think -- Any problem with me proceeding
18 this way, going ahead and sending out a scheduling order and
19 get the case moving on the rest of the case and leaving
20 Mr. Martin and his clients out at the present time, and then
21 you and Mr. Baker can largely prepare the response?

22 MS. BOELCKE: No. We'd like to go forward with the
23 case. Also, Your Honor, would we -- the plaintiff be allowed
24 to file something in regard to the declaratory --

25 THE COURT: Yeah.

1 MS. BOELCKE: -- relief issue?

2 Should we file it in response or should we just file
3 simultaneously?

4 THE COURT: It's up to you. Let me come back to that
5 question a minute.

6 Mr. Baker, are you okay with proceeding the way I'm
7 talking?

8 MR. BAKER: Yes, sir.

9 THE COURT: Okay. Do you have a sense as to maybe if
10 you sent that out when you would be setting the ISC?

11 Go back to your question. It's probably going to be
12 early January, it's going to be the beginning of next year
13 before I see you again, and that will give me some time to
14 maybe put this opinion together.

15 So, you know, I don't have any particular preference
16 as to whether you wait until Mr. Martin sends his in and if you
17 want to respond to it or whether you want to get it in at the
18 same time. Just be mindful that if I set this thing -- initial
19 scheduling conference in early January I'm going to be shooting
20 for having an opinion to you at that time.

21 MS. BOELCKE: Right.

22 THE COURT: I'm not promising it, because I've got
23 some trials I'm going to have to work through in December and
24 January, but I'll at least shoot for it, so you might want to
25 at least have it on my desk while I'm working on it.

1 MS. BOELCKE: Okay.

2 THE COURT: So I don't think we'll know today when
3 we'll be setting the ISC.

4 Mr. Martin, you're excused at the present time. If
5 all of a sudden we think something else is happening on these
6 official claims or the declaratory judgment, then we may
7 contact you and say, let's get on the phone and discuss it.
8 Otherwise, you're excused from that.

9 And then I'll try to have an opinion out for you, and
10 then I'll try to see you in early January to get the case
11 moving on the other claims.

12 All right. Is there anything else we need to discuss
13 while we're together? Anything else I can do for you?

14 Ms. Boelcke?

15 MS. BOELCKE: No thank you, Judge.

16 THE COURT: Mr. Baker?

17 MR. BAKER: No, sir.

18 THE COURT: Mr. Martin?

19 MR. MARTIN: Not from the individual federal
20 defendants. Thank you, Your Honor.

21 THE COURT: All right. Well, I appreciate your
22 presentations this morning. I'll try to get this out to you as
23 soon as possible.

24 Y'all have a good Thanksgiving, good week.

25 (Court stood in recess at 10:48 a.m.)

C-E-R-T-I-F-I-C-A-T E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Danna Schutte Everett, RPR, CCR, CRR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court held in the city of Albuquerque, New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on this 27th day of June, 2014.

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November 20, 2012, Mocek vs. City of Albuquerque

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